In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
DAVID G. BAIRD, FRED F. CHAMBERS, George O. Waterman, et al.
No. 409.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES ON THE MOTION TO DISMISS THE APPEAL AND ON THE MERITS.

STATEMENT OF THE CASE.

Pursuant to section 13 of the act to regulate commerce (24 Stat. L., 379), which provides that "*any person* * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof may apply to said Commission by petition," and that no such complaint "shall at any time be dismissed because of the absence of direct damage to the complainant," W. R. Hearst, on October 31, 1902, filed with the Interstate Commerce Commission a complaint against

the Philadelphia and Reading Railway Company, Lehigh Valley Railroad Company, Delaware, Lackawanna and Western Railroad Company, Central Railroad Company of New Jersey, New York, Susquehanna and Western Railroad Company, Erie Railroad Company, New York, Ontario and Western Railway Company, Delaware and Hudson Company, Pennsylvania Railroad Company, and Baltimore and Ohio Railroad Company, charging:

> That the defendants above named are common carriers severally engaged in the transportation of passengers and property between points in different States of the United States, and particularly are engaged in the transportation of anthracite and bituminous coals mined in the States of Pennsylvania, Maryland, and West Virginia, and shipped as interstate traffic over their several routes or lines, and as such common carriers are subject to the provisions of an act entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof and supplemental thereto.
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> That the rates charged and exacted by said defendants and each of them for the transportation of anthracite coal in carloads from points in the anthracite coal region of Pennsylvania to New York City and New York Harbor points and internal points of destination in the State of New York, to Boston, Boston points, and other points in

the New England States, to Baltimore and other points in the State of Maryland, and to Washington, in the District of Columbia, are unreasonable and unjust, and subject consumers of that commodity at such points of destination, and producers of such coal who are not common carriers or corporations owned and controlled by common carriers, to undue and unreasonable prejudice and disadvantage in favor, and to the undue and unreasonable preference and advantage, of said defendants and companies or corporations under their control, in violation of sections 1 and 3 of said act to regulate commerce.

That the rates charged and exacted by the defendants for the transportation of anthracite coal, as aforesaid, are also relatively unreasonable and unjust, and unjustly discriminating and unduly prejudicial to the interests of dealers and consumers of that commodity as compared with the rates contemporaneously charged and enforced by said defendants for the transportation of bituminous coal for much longer distances, and to all the points of destination hereinabove mentioned, and also as compared with defendants' rates and charges on other carload freight traffic generally, all of which is in violation of sections 1, 2, and 3 of said act to regulate commerce. That the defendants' schedules of rates and charges, as on file with this Commission, are hereby referred to and made part of this petition and complaint.

That the defendants, Lehigh Valley Railroad Company; Central Railroad Company of New Jersey; Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; New York, Susquehanna and Western Railroad Company, and the Philadelphia and Reading Railway Company, are, in the absence of agreement, natural competitors in the business of transporting anthracite coal from the anthracite coal fields in Pennsylvania to tide water at New York Harbor; two of said defendants, the Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey, being substantially parallel lines.

That during the years 1896, 1897, 1898, 1899, 1900, and 1901 the said six defendants last named, by an agreement with one another and by combination between one another, pooled, and having during the year 1902, by an agreement and combination as aforesaid, pooled freights and freight traffic in anthracite coal so as to divide the same between their different lines in agreed proportions, and have divided between them the aggregate or net proceeds of their earnings from the trasportation of anthracite coal in agreed proportions, in violation of section 5 of the act to regulate commerce. (Rec., pp. 39–40.)

On April 21, 1903, the Commission met in the city of New York to hear this complaint and simultaneously to make a general investigation into the management of the business of certain common

carriers subject to the act to regulate commerce, so as to inform itself as to the manner and method in which said business is conducted, and obtain from said carriers the full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created. (Sec. 12 of act to regulate commerce, as amended Mar. 2, 1899, and Feb. 10, 1891.)

The examination of witnesses was conducted by counsel for complainant on behalf of the latter's complaint and by members of the Commission on behalf of the general investigation.

In the course of the investigation several witnesses refused to produce contracts and to answer questions which the Commission considered and ruled to be germane to the inquiry, and necessary to enable it to discharge its duty and execute and enforce the provisions of the act to regulate commerce by informing itself as to the manner and method in which the business of common carriers subject to said act is conducted. (Petition, record, p. 14.) Thereupon, in pursuance of section 12 of the aforesaid act to regulate commerce, as amended, the Commission, under the direction of the Attorney-General, filed a petition in the United States circuit court for the southern district of New York, praying that the recalcitrant witnesses be compelled to produce the contracts and to answer the questions propounded. The nature of this evidence will appear more fully later on. The wit-

nesses filed separate answers to the petition, advancing various grounds why they should not be compelled to produce the contracts and answer the questions. These grounds may fairly be collected under four heads:

First. That the contracts and questions do not relate to any subject which the Interstate Commerce Commission is authorized, or could constitutionally be authorized, to investigate.

Second. That the contracts relate to the private business of persons not parties to the proceeding before the Interstate Commerce Commission.

Third. That the witnesses are protected from producing the contracts and answering the questions by the fourth, fifth, and tenth amendments to the Constitution of the United States.

Fourth. That the contracts and questions are not germane or relevant to the subjects under investigation by the Commission.

The circuit court dismissed the petition on the ground that the evidence sought was not germane or relevant to the questions before the Commission. An appeal was then taken direct to this court under section 3 of the act of February 19, 1903 (32 Stat. L., 848), and section 2 of the act of February 11, 1903 (32 Stat. L., 823). And in the view of the Government the case is also appealable direct to this court under section 5 of the circuit court of appeals act of 1891, as it "involves the construction of the Constitution of the United States," the defendants, by their answers, having

invoked the protection of the fourth, fifth, and tenth amendments to the Federal Constitution. Appellees, however, have moved to dismiss the appeal on the ground that there is no provision of law under which it can be taken direct to this court.

The evidence in controversy consists of:

I.

THE SO-CALLED PURCHASE CONTRACTS.

Contracts entered into since January 1, 1901, between the Lehigh Valley Coal Company, the Lehigh and Wilkesbarre Coal Company, the Philadelphia and Reading Coal and Iron Company, the Hillside Coal and Iron Company, the Delaware, Lackawanna and Western Railroad Company, respectively, and producers of anthracite coal or owners or operators of anthracite mines for the alleged purchase of anthracite coal, said producers, owners, and operators being commonly known as independent operators; and a contract between the Clarence Coal Company and the Hillside Coal and Iron Company purporting to be for the sale to the latter company of anthracite coal; and a contract between the Pine Hill Coal Company and the Philadelphia and Reading Coal and Iron Company purporting to be for the sale to the latter company of anthracite coal.

The refusal of the circuit court to compel the custodians of these contracts to produce them before the Interstate Commerce Commission is the subject of assignments of error numbered one to

six, inclusive. The issues raised by these assignments will be better comprehended in the light of the following additional facts. With the exception of the Delaware, Lackawanna and Western and the Delaware and Hudson, none of the so-called coal-carrying railroads named in the complaint to the Interstate Commerce Commission can, under the existing constitution and laws of Pennsylvania, engage in the business of mining and selling coal; but the railroads have nevertheless done so indirectly through the instrumentality of independent corporations whose stock they own. Thus, the Lehigh Valley Railroad Company owns all of the stock of the Lehigh Valley Coal Company (Rec., p. 296), and the same gentleman, Mr. E. B. Thomas, is president of both companies (Rec., p. 591); the Central Railroad of New Jersey owns nine-tenths of the shares of the Lehigh and Wilkesbarre Coal Company, and the same gentleman, Mr. George F. Baer, is president of both companies (Rec., p. 305); and the Erie Railroad Company owns a large majority of the shares of the Hillside Coal and Iron Company (Rec., p. 312) and practically all of the stock of the Pennsylvania Coal Company (Rec., p. 591). In the case of the Philadelphia and Reading Railway Company, the leading coal-carrying road, the arrangement is slightly different in form, but it amounts to the same thing: A holding company, now known as the Reading Company, holds all the stock of the Philadelphia and Reading Railway

Company and of the Philadelphia and Reading Coal and Iron Company, a coal mining company, the same gentleman, Mr. George F. Baer, being president of the three companies. (Rec., pp. 420–423.)

The substantial identity between the railroads and the coal companies whose stock they owned respectively, is recognized in the opinion of the circuit court. (Rec., pp. 833, 834.)

The railroad companies and the coal companies are thus, for all practical purposes, one and the same, the latter simply being devices by means of which the former do indirectly that which the law prohibits them from doing directly. Together these coal-carrying railroads (and for convenience and brevity I include in this designation the Reading Company, the holding company which owns all of the stock of the Philadelphia and Reading Railway Company) control, the Delaware, Lackawanna and western and the Delaware and Hudson directly and the others indirectly through the coal companies, 96 per cent of all the unmined anthracite coal in the Pennsylvania fields, the Reading Company alone controlling 63 per cent. (Rec., p. 427.) The mines not controlled or operated by the coal companies in the interest of the railroad companies, as just described, are operated by individuals, firms, and corporations, commonly known as independent or individual operators.

The contracts of purchase involved in assignments of error one to five were thus between the coal companies, acting in the interest of the

respective railroads as vendees, and independent operators, as vendors; while those described in the sixth assignment were between the Delaware, Lackawanna and Western Railroad Company, acting in its own behalf, as vendee, and independent operators, as vendors. The evidence indicates that the contracts are all substantially alike, the important and material features common to all being (*a*) that the purchase price of prepared sizes of anthracite (being all sizes above pea coal) is fixed at 65 per cent of the average price realized at tide water by the railroad companies or the coal companies controlled by the railroad companies; (*b*) that the vendors will sell *all* their coal to the vendees, and (*c*) that shipments shall be made *as called for by the vendees*. (Rec., pp. 15–17.) Now, inasmuch as the coal companies are owned and controlled by and operated in the interest of the railroads, these agreements amount to this: That the railroads take the coal of the independent operators, transport it to tide water, and pay the operators 65 per cent of the price realized there, retaining 35 per cent, from which must be deducted the cost of selling, which the evidence shows to be from 10 to 20 cents a ton. (Rec., p. 511.)

The evidence, furthermore, shows that since January 1, 1901, the average market price of prepared sizes of anthracite coal, f. o. b., tide water, New York Harbor, has been at various times $4 per ton; and the tariffs filed with the Interstate Com-

merce Commission show that since January 1, 1901, the railroads whose business was being investigated by the Commission have charged, respectively, the following freight rates per ton for hauling prepared sizes of anthracite coal from the coal fields of Pennsylvania to tide water, f. o. b.:

Lehigh Valley Railroad, Hazleton to Jersey City, $1.65.

Delaware, Lackawanna and Western, Scranton to Hoboken, $1.60.

Central Railroad of New Jersey, Mauch Chunk to Hoboken, $1.75.

Philadelphia and Reading Railway, Shamokin to Hoboken, $1.75.

Philadelphia and Reading Railway, Shamokin to Port Reading, $1.55.

New York, Ontario and Western, Scranton to Weehawken, $1.60.

Erie Railroad, Carbondale to Jersey City, $1.75.

Whence it follows that when a railroad company, or a coal company owned by it, purchases coal from an independent operator, carries it to tide water, and sells it there for, say, $4 a ton (a price that has frequently prevailed in recent years) it pays the independent operator, under these contracts, 65 per cent of $4, or $2.60 a ton. The remainder, $1.40, less the cost of selling, which is from 10 to 20 cents a ton, is therefore the amount the railroad company really receives for transporting the coal. But this is less than the published tariff rates. And an independent operator who did not care to dispose of his coal in this way would have

to pay the published rates, which are from $1.55 to $1.75 a ton.

The vouchers described in the seventh assignment of error will not be considered separately because they relate to the so-called purchase contracts described in the fifth assignment of error, and are relevant or irrelevant according as the latter shall be viewed by the court.

II.

THE TEMPLE IRON COMPANY CONTRACTS.

There was a series of such contracts, all, however, connected and forming part of the same scheme.

1. Agreement dated February 27, 1899, between the firm of Simpson & Watkins, vendors, and the Temple Iron Company, vendee, whereby the latter acquired the collieries owned by the former, giving in payment therefor its capital stock and bonds, to wit, $2,260,000 in stock and $3,500,000 in bonds.

2. Agreement dated February 27, 1899, between the firm of Simpson & Watkins and the Guaranty Trust Company, whereby the former transferred to the latter the $2,260,000 of stock of the Temple Iron Company and $2,100,000 of the bonds of that company, which the said firm of Simpson & Watkins had accepted in payment for their collieries; receiving from the Guaranty Trust Company in return $3,238,396.66 in cash and certificates of beneficial interest in respect of $1,000,000 of the stock of the Temple Iron Company.

3. Six separate agreements, as follows, all dated February 27, 1899: (a) Agreement between the Temple Iron Company, the Guaranty Trust Company, and the Reading Company, whereby the Reading Company agreed (1) to purchase 29.96 per cent of the capital stock of the Temple Iron Company (practically all of which was then held by the Guaranty Trust Company), and to guarantee the payment of six per cent annual dividends on that proportion of said capital stock; and (2) to guarantee payment of 29.96 per cent of the bonded indebtedness, principal and interest, of the Temple Iron Company; (b) similar agreement between the Temple Iron Company, the Guaranty Trust Company, and the Lehigh Valley Railroad Company, in respect of 22.88 per cent of the stock and bonds of the Temple Iron Company; (c) similar agreement between the Temple Iron Company, the Guaranty Trust Company, and the Central Railroad Company of New Jersey, in respect of 17.12 per cent of the stock and bonds of the Temple Iron Company; (d) similar agreement between the Temple Iron Company, the Guaranty Trust Company, and the Delaware, Lackawanna and Western Railroad Company, in respect of 19.52 per cent of the stock and bonds of the Temple Iron Company; (e) similar agreement between the Temple Iron Company, the Guaranty Trust Company, and the Erie Railroad Company, in respect of 5.84 per cent of the stock and bonds of the Temple Iron Company; (f) similar agreement between the Temple

Iron Company, the Guaranty Trust Company, and the New York, Susquehanna and Western Railroad Company, in respect of 4.68 per cent of the stock and bonds of the Temple Iron Company.

4. Agreements dated April 10, 1899, between the Guaranty Trust Company and each of the railroad companies, providing additional means for enforcing the obligations undertaken by the railroad companies.

Copies of each of these four classes of contracts appear as exhibits to the answer of George F. Baer. (Record, pp. 73–91.)

This appeal does not raise any issue as to the admissibility of the contracts described under (1), (2), and (4) supra, but only as to the admissibility of those described under (3) supra; and the refusal of the circuit court to compel Mr. George F. Baer, president of the Temple Iron Company, to produce the latter in evidence before the Interstate Commerce Commission is the subject of the eighth assignment of error.

The motive of this transaction, in which six of the leading coal-carrying railroads joined hands so harmoniously, and its relations to the questions before the Commission will be better understood when it is stated that Simpson & Watkins, the vendors, and the largest and most powerful of the independent operators, had projected and were vigorously pushing the construction of a new line of railroad from the coal fields to the seaboard, which would have been a competitor of the exist

ing roads; but when their collieries were taken off their hands at a very handsome price their interest in the project abated, and it fell through.

The court below thus described the movement which led up to the Temple Iron Company contracts:

> It appears that heretofore certain coal operators and coal companies which were not owned or controlled by the defendants, being dissatisfied with the freight rates or with the manner in which the business of transportation was being conducted, came together for the purpose of building or securing the building of a new road from the coal regions where their mines were located to tide water. The defendants, being unwilling to meet the competition which such a new road would introduce, combined together and bought up the collieries of those who were promoting the new road. Thereupon the project of building such competing road was abandoned. The contracts in question are parts of the machinery by which this combination prevented the building of the new road.

III.

THE ORAL TESTIMONY.

Two of the witnesses before the Commission, namely, Mr. E. B. Thomas, president of the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company, and Mr. William H. Truesdale, president of the Delaware, Lackawanna and

Western Railroad Company, refused to give an swers to certain questions propounded them; and the refusal of the circuit court to compel them to answer is the subject of the remaining assignments of error, to wit:

> Tenth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring Eben B. Thomas to answer the question, "Are the prices of anthracite coal at tide water fixed by agreement between the presidents of these different coal companies?"
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> Eleventh. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring Eben B. Thomas to answer the question, "Who fixed the price of coal of the Hillside Coal and Iron Company and the Pennsylvania Coal Company that was sold at tide water during your connection with those properties?"
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> Twelfth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring Eben B. Thomas to answer the question, "Who fixes the price of the coal of the Lehigh Valley Coal Company that is sold at tide water?"
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> Thirteenth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring Eben B. Thomas to answer the question, "Bearing in mind your testimony that you do not believe in reckless competition, do you also conduct the business of selling coal in accordance with those same ideas, so as to

avoid what you regard as reckless competition?"

Fourteenth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring William H. Truesdale to answer the question, "You maintain a sales department of you own at the city of New York, don't you?"

Fifteenth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring William H. Truesdale to answer the question, "Do you consider that 20 cents a ton commission that you have charged here against the cost and expense of mining is a fair and reason able charge for commission?"

Sixteenth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring William H. Truesdale to answer the question, "Well, when coal is sold at tide water at $4 a ton and you pay out 65 per cent of it to the private operator you lose money on each transaction, do you not, if you charge up $1.55, or the full tariff rate, against the transportation of that coal?"

Seventeenth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring William H. Truesdale to answer the question, "What is the price of coal to-day sold by the Delaware, Lackawanna and Western at tide water?"

Eighteenth. The court erred in dismissing the petition of the Interstate Commerce

Commission for an order requiring William H. Truesdale to answer the question, "What has happened to make the advance? Has there been any change that you know of in the supply of coal since yesterday?"

Nineteenth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring William H. Truesdale to answer the question, "Have you observed any change in the demand for coal since yesterday?"

Twentieth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring William H. Truesdale to answer the question, "Has the cost of producing coal gone up any since yesterday?"

Twenty-first. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring William H. Truesdale to answer the question, "Who fixes the price of Delaware, Lackawanna and Western coal at tide water?"

Twenty-second. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring William H. Truesdale to answer the question, "How do you account for the fact that the price circulars are uniform if there is no agreement?"

Twenty-third. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring William H. Truesdale to answer the question, "Don't you know, from your expe-

> rience and knowledge of the business, that the increase in wages will not make a difference of over 15 cents a ton in the cost of producing anthracite coal?"

Before discussing whether or not the circuit court erred, as the Government contends, in refusing to compel the witnesses to produce the contracts described and to answer the questions set forth, it will be necessary to consider the jurisdictional question raised by the motion to dismiss, and the following argument will be addressed chiefly, though not wholly, to that branch of the case, the brief of Mr. Carlisle, counsel for the Interstate Commerce Commission, having very fully discussed the merits of the appeal.

THE ARGUMENT ON THE MOTION TO DISMISS THE APPEAL.

The motion to dismiss this appeal for want of jurisdiction is based on the ground that there is no provision of law under which the appeal could be taken direct to this court from the decree of the circuit court for the southern district of New York. It is believed, however, that there are two separate and distinct provisions of law, under either of which this court would have jurisdiction of the appeal.

1. Section 2 of the act of February 11, 1903, hereafter called the "expediting act," provides:

> That in *every suit in equity* pending or hereafter brought in any circuit court of the United States under any of said acts wherein the United States is complainant, including

> cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court, and must be taken within sixty days from the entry thereof. * * *

And in section 3 of the act of February 19, 1903, entitled "An act to further regulate commerce with foreign nations and among the States," it is enacted that the above provision "shall apply to *any case* prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission."

The change in phraseology from "every suit in equity" to "any case," without the limitation "in equity," is significant of the wider field covered by the later provision and will be commented upon presently.

The present proceeding is a "case" (*Brimson's case*, 154 U. S., 478), and it is being "prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission." It would seem almost self-evident, therefore, that it is appealable directly to this court under the provisions quoted from the act of February 11 and 19, 1903, respectively, and any other result would tend to frustrate the purpose of Congress in passing these expediting acts, which was to facilitate the enforcement of the acts to regulate commerce and the Federal antitrust act.

The hearing and investigation by the Interstate Commerce Commission out of which this proceed-

ing grew has been interrupted and the Commission's judgment delayed by the refusal of certain witnesses to produce evidence, which the Commission regarded as competent, on the grounds that it is irrelevant and that they are protected from producing it by the Constitution of the United States. As the Commission's investigations usually constitute the first step in the enforcement of the acts to regulate commerce, the continuance of such investigations pending the decision of issues of this kind delays just so long the enforcement of those acts; and it was to shorten such delays as much as possible that the expediting acts were passed, doing away with intermediate appeals to the circuit courts of appeals in "*any case* prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission." The present proceeding, therefore, not only falls within the very letter of those enactments, but also within their spirit and purpose.

But an attempt has been made to show, by a laborious process of construction, that the word "case" in the above-quoted passage from the act of February 19, 1903, means "suit in equity," and therefore does not embrace a proceeding like the present one. It is, however, an elementary canon of construction that where the legislature has used words which have a well-understood and clearly defined meaning, such as the words "any case"

(*Brimson's case, supra*), it must be presumed to have intended that that meaning should be attributed to them, and construction can not be resorted to for the purpose of giving them a different meaning. Moreover, it is not to be assumed that in this legislation of February 19, 1903, Congress used words unmeaningly. On the contrary, every presumption is in favor of the view that the marked change in phraseology from "every suit in equity" in the earlier statute to the much more comprehensive words "any case" in the later statute was designed and intentional. It was evidence of the purpose of Congress to enlarge the operation of the earlier act; and it is pertinent to ask, How could that purpose be more plainly or aptly expressed?

Said Chief Justice Woodward in *Rich* v. *Keyser* (54 Pa. St., 86, 89):

> Indeed, the words of a statute, when unambiguous, are the true guide to the legislative will. That they differ from the words of a prior statute on the same subject is an intimation that they are to have a *different and not the same* construction, for it is as legitimate a use of the legislative power to alter prior statutes as to displace the common law.

And in *Endlich on the Interpretation and Construction of Statutes* the principle is stated at page 534 as follows:

> As the same expression is presumed to be used in the same sense throughout an act

> *or a series of cognate acts*, so a *difference of language* may be prima facie regarded as indicative of a *difference of meaning*.

Finally, one of the aspects of the great case of *Hunter* v. *Martin* (1 Wheat., 304, 337) is peculiarly in point here. I say peculiarly, because not only was it attempted there as here to qualify and restrain, by construction, the application of a word which had a clear and well-understood meaning, but the attempt was made with reference to this very word "case," and the manner in which this court disposed of the contention at that time may be of some assistance now. The argu ment was that in determining the appellate juris diction of this court, the term "all cases," as used in the third article of the Constitution, did not mean "all cases" but only "some cases," that is, did not include cases in the State courts, but only those in the lower Federal courts. But said Mr. Justice Story, speaking for the court:

> The appellate power *is not limited by the terms of the third article* to any particular courts. The words are "the judicial power (which includes appellate power) shall extend to all cases," etc., and "in all other cases before mentioned the Supreme Court shall have appellate jurisdiction." It is the case then, and not the court that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the *letter* of the Constitution for any *qualification* as to the tribunal where it depends. It is

> incumbent, then, upon those who assert such a qualification to show its existence by *necessary implication*. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, *unless the inference be irresistible*.

The contention of the opposing counsel appears to turn wholly on the fact that that part of section 3 of the act of February 19, 1903, which the Government claims authorizes the appeal, is introduced by the word "provided." The argument is that that makes it a *proviso* to section 3, by reason whereof it should be construed to apply only to the class of cases described in that section, namely, suits in equity. It is not likely that this court will be much impressed with the force of that argument. It has come to be a very common thing for legislatures to use the word "provided" in a loose, inartificial sense, rather than in the technical sense in which it is used in works on statutory construction. The office of a "proviso," technically speaking, is, as said by Mr. Justice Story in the case mentioned by counsel for appellants (*Minis* v. *United States*, 15 Pet., 423), "either to exempt something from the enacting clause or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview."

Now, a glance at section 3 of the act of February 19, 1903, will satisfy the mind that the passage beginning with the word "provided" performs

none of these offices. It does not, even accepting the construction put upon it by opposing counsel, exempt, qualify, restrain, or exclude anything that precedes it; on the contrary, it adds to what went before; it is something additional; it extends to a new field. It is not, therefore, in reality, a proviso in the strict sense, and the fact that it is introduced by the word "provided" does not make it such. In short, it should be construed as if the word "provided" were not there, or as if it began "be it further enacted," or stood as a separate section, because it is an affirmative, independent enactment.

In the very recent case of the *Chesapeake and Potomac Tel. Co.* v. *Manning*, 186 U. S., 238, 242, precisely the same argument as has been made here, based on precisely the same use of the word "provided," was pressed upon this court and rejected. The legislation in controversy there was a so-called proviso in a section of an appropriation act making provision for the expenses of the government of the District of Columbia (act of June 30, 1898; 30 Stat. L., 525, 538). The entire section will be quoted, so that the complete parallel between that case and this may be seen at a glance:

> TELEGRAPH AND TELEPHONE SERVICE.
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> For superintendent, one thousand six hundred dollars; electrician, one thousand two hundred dollars; three telegraph operators, at one thousand dollars each; three

telephone operators, at six hundred dollars each; expert repair man, nine hundred and sixty dollars; three repair men, at seven hundred and twenty dollars each; two laborers, at four hundred dollars each; in all, eleven thousand five hundred and twenty dollars.

For general supplies, repairs, new batteries and battery supplies, telephone rental and purchase, wire for extension of the telegraph and telephone service, repairs of lines and instruments, purchase of poles, tools, insulators, brackets, pins, hardware, cross arms, ice, record books, stationery, printing, purchase of harness, washing, blacksmithing, forage, extra labor, new boxes, and other necessary items, eleven thousand five hundred dollars: *Provided*, That from and after the passage of this act it shall be unlawful for any person or any telephone company doing business in the District of Columbia to charge or receive more than fifty dollars per annum for the use of a telephone on a separate wire; forty dollars for each telephone, there being not more than two on a wire; thirty dollars for each telephone, there being not more than three on a wire, and twenty-five dollars for each telephone, there being four or more on the same wire.

Mr. Justice Brewer, who delivered the opinion of the court, thus stated and disposed of the contention that that part of the section introduced by the word "provided" constituted a proviso, technic-

ally speaking, and was therefore to be construed only as a qualification of, or in subordination to, what preceded it:

> In its answer defendant pleaded that this legislation [that is, that part of the above-quoted section beginning "*provided*"] "has no application to any individual desiring telephone service, but applies only to such service as may be rendered for the public to the District of Columbia, for the service rendered to said District for fire alarm, police, and other public purposes." This defense is undoubtedly based on the fact that the paragraph in which this proviso is found, entitled "telegraph and telephone service," consists solely of appropriations for salaries and supplies in connection with telegraph and telephone service. As the paragraph, therefore, deals solely with public expenditures, *the contention is that the proviso is a qualification of such public expenditures.*" As said by Mr. Justice Story, in *Minis* v. *United States*, 15 Pet., 423, 445:
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> "The office of a proviso generally is either to except something from the enacting clause, or to qualify or restrain its generalities, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."
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> See also *Austin* v. *United States*, 155 U. S., 417, 431.
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> *While this is the general effect of a proviso, yet in practice it is not always so limited.*

As said in *Georgia Banking Company* v. *Smith*, 128 U. S., 174, 181:

"The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

In view of the general language of this proviso, it is not strange that appellant has not pressed this defense upon our consideration, and we are informed by counsel for the appellee that it was not called to the attention of the lower courts. We notice it only as leading up to a matter which is now presented.

I append references to several of the many instances in which the word "provided" has been used by Congress, not to introduce a technical proviso, but to introduce new legislation, general in its operation, and not limited to the subjects

referred to in the act or section of which it forms a part:

(*a*) Act of May 31, 1872, for relief of John Potts (17 Stats., 195).

(*b*) Army appropriation act of July 16, 1874 (18 Stats., 72), containing a proviso concerning the traveling expenses of any person employed under the United States.

(*c*) The legislative, executive, and judicial appropriation act of March 3, 1875 (18 Stats., 351), containing a proviso fixing the fees for money orders.

(*d*) Joint resolution of March 3, 1875, for relief of Lowell A. Chamberlain (18 Stats., 525).

(*e*) The deficiency appropriation act of March 3, 1900 (31 Stats., 1023), containing a proviso in regard to the settlement of claims growing out of Government transportation over certain Pacific railroads.

But suppose it were conceded that the so-called proviso to section 3 of the act of February 19, 1903, applied only to the class of proceedings described in that section, as opposing counsel contend. How could that help them? The most that can be said of the proceedings provided for in that section is that they are of the nature of equitable proceedings. They can not be said to be suits in equity, strictly speaking, for the very terms of the act are that, after the filing of the petition, "it shall be the duty of the court *summarily* to inquire into the circumstances, * * * *without the formal pleadings and proceedings applicable to ordinary suits*

in equity." And the learned counsel for the appellees, Baer, Brown, Waterman, Thomas, and Baird, recognized the distinction when they referred to the proceedings in question, at page 12 of their brief, on the motion to dismiss, as "*the particular class of equitable proceedings* authorized by the act containing this proviso." Now, it being admitted that the proceedings described in section 3 of the act of February 19, 1903, are not technical suits in equity, but merely statutory proceedings of the nature of equitable proceedings, it would seem clearly to follow that the proceeding at bar comes within the purview of that section, because it is of the nature of a proceeding in equity rather than at common law. It was, to point out some of its equitable characteristics, instituted by a *petition*, to which *answers* were filed, and the review proceedings have been treated as an *appeal*, not as a writ of error. The proceeding, indeed, is very much like a bill for discovery.

2. This case is also appealable directly to this court under section 5 of the circuit court of appeals act of 1891, as it "involves the construction or application of the Constitution of the United States." That section provides:

> SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> *In any case that involves the construction or application of the Constitution of the United States.*

> In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In answer to the petition to compel the production of the evidence sought by the Interstate Commerce Commission, the respondents below maintained not only that the evidence was irrelevant but also that they were protected from producing it by the fourth, fifth, and tenth amendments to the Constitution of the United States. And to show how real and substantial the constitutional issue is and how definitely and directly it is involved in the case, I quote the following passage from the answer of George F. Baer, one of the respondents (Rec., p. 64):

> This respondent is further advised, and so alleges and charges, that in case it shall be held that the said act to regulate commerce confers upon the Commission power to require, by subpœna or otherwise, the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents not *directly and solely* relating to matters of commerce between the States to be inquired into pursuant to the provisions of the said act, then the said act is unconstitutional and void, being in direct violation of the provisions of the fourth amendment to the Constitution of the United States and in derogation of the right of this respondent and of the corporation of which

he is an officer and of which the said Guaranty Trust Company is the depository to have their private books and private affairs protected from unreasonable search or seizure. And in case it shall be held that the said act confers authority on said Commission to call for documents or testimony which shall prove or be held to prove the commission of acts which would subject any of the parties to any of the penalties imposed by and under the act to regulate commerce, then the said act is unconstitutional and void, as being in direct violation of the provisions of the fifth amendment to the Constitution of the United States and in derogation of the right of all of the said parties to be protected from the production of evidence to sustain a penal forfeiture.

And further, that the assumption of such power and authority on the part of the Congress of the United States is in violation of the tenth amendment to the Constitution providing that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

It would seem, therefore, that if there is such a thing as a "case that involves the construction or application of the Constitution of the United States," this is one. But it is contended not to be such because the constitutional question was not "*decided* by the court below," which, being of opinion that the evidence was irrelevant, decided the case on that point. Suppose, however, that it shall be

found, upon review, as we believe it will be, that this evidence, or certainly some of it, is relevant, then the question of constitutional construction must be passed upon. That question, therefore, is in the strictest sense *involved* in the case as a controlling question, and it is a real and substantial question, definitely and sufficiently stated on the record, and the circuit court was expressly asked to pass upon it. It is submitted that these facts are sufficient, under the decisions of this court now to be examined, to warrant a direct appeal under section 5 of the circuit court of appeals act, and that it is not necessary to show that the circuit court actually *determined* the constitutional question.

(*a*) *Cornell* v. *Green*, *163 U. S.*, *75*, *78*.—This case is cited in the briefs of all of the opposing counsel in support of their motion to dismiss, and the Government also is quite willing to rest its case on that judgment. Mr. Justice Gray, who delivered the opinion of the court, after stating that "the appellate jurisdiction of the court is sought to be maintained upon the single ground that the case 'involves the construction or application of the Constitution of the United States' within the meaning of the judiciary act of March 3, 1891," proceeded to point out the circumstances under which a direct appeal would lie under that provision:

> But in order to bring a case within this clause of the act, the circuit court must have

> construed the Constitution or applied it to the case, *or must at least have been requested and have* declined or *omitted to construe or apply it.* No construction or application of the Constitution can be said to have been involved in the judgment below when no construction or application thereof was either expressed *or asked for.*

The appeal in the case was dismissed, it is true, but because—

> The Constitution of the United States *is not mentioned* in the bill of Cornell, or in the demurrer of the defendant, or in the decree or the opinion of the court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right. The first indication of anything like an intention on the part of the plaintiff to invoke the protection of the Constitution of the United States is in the suggestion, in the assignment of errors, "that said finding deprived said complainant of his property without due process of law. * * *" An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891. (Pp. 79 and 80 of the report.)

(*b*) *Filhiol* v. *Maurice*, *185 U. S.*, *108*, *110*, is exactly in point. Here the jurisdiction of the circuit court was invoked "on the ground that the

case arose 'under the Constitution or laws of the United States, * * *'" (p. 110 of the Report); and on that ground this court held that "the writ of error was properly taken directly to this court" (p. 110 of the Report), although the review disclosed the fact that the case *did not arise* under the Constitution or a treaty of the United States. But the feature of this case which I wish most to emphasize is that the record simply showed that "the circuit court decided that the complaint failed to set up a cause of action." "*The particular grounds of the decision of the circuit court on the merits do not appear*, nor is it material, as that court manifestly had no jurisdiction." (P. 111 of the Report.) That is, it did not appear that the circuit court *determined* any constitutional issue; yet this court took cognizance of the direct appeal, not on the ground that the jurisdiction of the circuit court had been disputed, because it had not been, nor had the statutory conditions precedent to an appeal on that ground been complied with; but it heard the appeal, according to its own statement, "on the ground that the case arose 'under the Constitution or laws of the United States'" (p. 110 of the Report), although it did not appear that the circuit court *decided* the constitutional question. (P. 111 of the Report.) And if this court ruled thus when the jurisdictional question was, Is this a case "*arising* under the Constitution or laws of the United States?" a fortiori, it must have so ruled if the jurisdictional question had been, Is

this a case that "*involves* the construction or application of the Constitution of the United States?" (Infra, pp. 42–44.)

(*c*) *Penn Mutual Life Insurance Company* v. *Austin, 168 U. S., 685, 695.*—Mr. Justice White, in delivering the opinion of the court, stated and discussed the grounds on which it was contended, in that case, that a direct appeal did not lie:

> The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist not only disregards the letter of the statute, but is unsound in reason. It says that the right to the direct appeal can alone rest on the proposition "That the constitution or a law of the State of Texas conflicts with appellant's contract and contravenes the Federal Constitution; in other words, it must affirmatively appear upon the face of complainant's bill that there was involved in this case a Federal question, *the determination of which* was essential to a correct decision of the case." But the words of the statute, which empower this court to review directly the action of the circuit court, are that such power shall exist wherever it is *claimed* on the record that a law of a State is in contravention of the Federal Constitution. Of course the claim must be real and colorable, not fictitious and fraudulent.

(*d*) *Holder* v. *Aultman, 169 U. S., 81, 88.*—Although, in this case, it did appear that the circuit court actually decided the constitutional

question, yet this court apparently did not regard that as a jurisdictional fact, for it said:

> Upon such a writ of error, differing in those respects from a writ of error to the highest court of a State, *the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below;* and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case.

And, as a matter of fact, this court did not decide the constitutional question, but disposed of the case on another ground.

(*e*) *Loeb* v. *Columbia Township Trustees*, *179 U. S.*, *472*, *479*.—In this case, after discussing the jurisdictional tests in certain other classes of appeals, Mr. Justice Harlan, who delivered the opin ion of the court, continued:

> But no such test of the jurisdiction of this court to review the final judgment of the circuit court is prescribed by the fifth section. Our jurisdiction depends *only* on the inquiry whether that judgment was in a case in which it was *claimed* that a State law was repugnant to the Constitution of the United States.

(*f*) In Desty's Federal Procedure it is said, discussing the right of direct appeal under section 5 of the act of 1891:

> The constitutional question need not have

been upheld or denied in the court in order to give the Supreme Court jurisdiction. (Vol. I, p. 651.)

In support of the position that a case does not "*involve* the construction or application of the Constitution of the United States," so as to give a direct appeal to this court, unless the constitutional question was actually *decided* by the circuit court, counsel for appellees refer to the following cases:

Ansbro v. *United States*, 159 U. S., 695.
Cornell v. *Green*, 163 U. S., 75.
Muse v. *Arlington Hotel Co.*, 168 U. S., 430.
Sampasas v. *Bell*, 180 U. S., 276.
Carey v. *Houston, etc., Ry. Co.*, 150 U. S., 170.
Carter v. *Roberts*, 177 U. S., 496.
Western Union Tel. Co. v. *Ann Arbor R. R.*, 178 U. S., 239.
Defiance Water Co. v. *Defiance*, decided Nov. 30, 1903.
Arbuckle et al. v. *Blackburn*, decided Dec. 7, 1903.

It is believed, however, that an examination of these cases will prove that several of them involved the construction of provisions of law materially different from section 5 of the act of 1891, and that in those which came under that section the appeals or writs of error, when dismissed for want of jurisdiction, were dismissed, not because the constitutional question was not *decided* by the lower court, but either because it was not a

real and substantial question, or was not a controlling question, or was not logically and definitely stated, or was not raised until the assignment of errors. The judgments in some of these cases, moreover, distinctly uphold the Government's position, as will be pointed out.

(*a*) *Ansbro* v. *United States*.—In this case the writ of error was dismissed because this court could not "find that any constitutional question was raised at the trial. * * * The first time that anything appears upon that subject is in the assignment of errors." (P. 697 of the Report.) And the court added:

> An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised in the court below and rulings *asked* thereon so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891.

Mark the language: "Rulings *asked;*" not "rulings *asked and made*."

(*b*) *Cornell* v. *Green*.—This case has already been fully considered, supra, p. 33.

(*c*) *Muse* v. *Arlington Hotel Co*.—The writ of error here was dismissed because the jurisdiction of the circuit court was invoked on the ground of diverse citizenship, and therefore, under the act of March 3, 1891, the case should have been taken to the circuit court of appeals, the judgment of which would have been final. No substantial constitutional question was presented. An attempt

was made to make it appear that the case involved the constitutionality of an act of Congress known as the Hot Springs act of June 11, 1870. But this court did not take that view:

> * * * The constitutionality of the act, if held to apply to the claim, rather than to the amenability of the United States to suit, was not considered; nor does it appear that the judgment of the circuit court was *invoked* upon it.

Again note the language of the court: was neither considered *nor invoked;* clearly indicating that in either of those events the direct appeal would have lain.

(*d*) *Lampasas* v. *Bell.*—In this case the writ of error was dismissed because the party who raised the constitutional question was not legally interested in it. Said the court:

> It follows necessarily that the plaintiff in error has no legal interest in the constitutional question which it raised and upon which it claims the right to come directly to this court from the circuit court under section 5 of the act of 1891, supra. To permit it to come here directly from the circuit court would make a precedent which would lead to the destruction of the statute. We repeat, the questions which can be raised under any of the subdivisions of section 5 of the act must be real, the controversies they present must be substantial, not only from the nature of the principles invoked,

but from the relation of the party to them by whom they are invoked.

(*e*) *Carey* v. *Houston, etc., Railway*.—The appeal in this case was dismissed because the construction or application of the Constitution of the United States was not "involved as controlling," and the sense in which the court used that expression is disclosed by the passage which immediately follows it:

> The bill before us refers to no provision of the Constitution upon which complainants relied to invoke the action of the court in vindication of their supposed rights, or which was presented to be construed or applied by the court. *No question upon such construction or application was raised* between the parties upon the record, *or determined* by the decree of the circuit court.

Again, consider the language of the court: Raised *or* determined; not raised *and* determined.

(*f*) *Carter* v. *Roberts*.—It will be found that this case contains nothing pertinent to the question in hand.

(*g*) *Western Union Tel. Co.* v. *Ann Arbor Railroad*, *Defiance Water Company* v. *Defiance*, *and Arbuckle et al.* v. *Blackburn*.—In neither of these cases was it decided that the circuit court must have actually passed upon the constitutional question involved in order to give the right of direct appeal. The point decided in the first two cases was that the constitutional question attempted

to be raised was not real or substantial, but fictitious, and that therefore the respective circuit courts erred in taking original jurisdiction. The following language from the opinion in *Defiance Water Co.* v. *Defiance* sufficiently indicates the ground on which this court based its action in these cases:

> We regard this bill as an attempt to evade the discrimination between suits between citizens of the same State and suits between citizens of different States, established by the Constitution and laws of the United States, by bringing into the circuit court controversies between citizens of the same State, an evasion which it has been the constant effort of Congress and of this court to prevent (*Bernards Township* v. *Stebbins*, 109 U. S. 341, 353; *Shreveport* v. *Cole*, 129 U. S. 36, 44), and are of opinion that it should have been dismissed for want of jurisdiction.

In the case of *Arbuckle et al.* v. *Blackburn* the appeal, which was from the decree of a circuit court of appeals, was dismissed "because the jurisdiction of the circuit court was 'dependent entirely upon the opposite parties to the suit or controversy being citizens of different States,' and the decree of the circuit court of appeals was final."

But in any event the judgments in those cases could not control the case at bar, because in each of them the question was, Is this a case "*arising under* the Constitution or laws of the United States" within the meaning of the act of August

13, 1888? While here the question is, Is this a case that "involves the construction or application of the Constitution of the United States" within the meaning of section 5 of the act of March 3, 1891? There is, of course, a distinction with a very important difference between these two questions, and it is from the failure to note this distinction, I apprehend, that the contention proceeds that no direct appeal lies in this case because the constitutional issue raised was not *decided* by the circuit court.

It needs no argument to prove that "involving" is a much larger term than "arising under." Cases may *involve* the construction of the Constitution, and yet not *arise under* it. To *arise under* the Constitution, within the meaning of the act of August 13, 1888, the case must, of course, rest on some provision thereof, and it may well be held, also, in order to prevent the undue extension of the jurisdiction of the Federal courts at the expense of that of the State courts, that before a case can be said to have *arisen* under the Constitution it must have been *decided* on the constitutional ground. Moreover, it has been held "that where the plaintiff invokes the jurisdiction of the circuit court solely upon the ground of diverse citizenship, and * * * the claim of the invalidity of a State statute under the Constitution of the United States *came from the defendant* * * * then the judgment of the circuit court of appeals is final within

the meaning of the sixth section of the act of 1891" (*Loeb* v. *Columbia Township Trustees*, 179 U. S., 479, and cases there cited), and no appeal can be taken to this court on the constitutional ground.

But a case "involves" the construction of the Constitution under section 5 of the act of 1891, regardless of who raised the constitutional question; nor is there here any delicate consideration of a possible encroachment on the jurisdiction of the State courts to guard against. Furthermore, if Congress had not intended in the enactment of March 3, 1891, that the expression "*involving* the construction or application of the Constitution of the United States" should cover a wider field than the expression "*arising under* the Constitution of the United States," it is reasonable to suppose that it would have employed the latter phraseology, which it had used in previous enactments and with the interpretation of which it was familiar.

ARGUMENT ON THE MERITS OF THE APPEAL.

I.

The first point to be noticed is the suggestion, which, however, does not seem to have been pressed (although remarked upon by the circuit court), that the Interstate Commerce Commission had no jurisdiction to hear the complaint because the complainant is not himself a shipper of coal. But that suggestion can hardly stand in the face of the broad, plain, and express language of the act to

regulate commerce, which provides "that *any person*, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts." It is hardly worth while to point out here how uniformly the courts have overridden attempts to qualify, change, or limit, by construction, the meaning of perfectly clear and unambiguous words in a statute, as that subject was gone into in the argument on the motion to dismiss the appeal (*supra*, p. 21–23.) Congress has said that any person may file a complaint of this character, and in the absence of unmistakable evidence to the contrary, it must be presumed to have meant *any person*, not *some persons*. Again—and if the answer to the objection that the complainant is not a shipper is not already conclusive this would seem to make it so—the section provides that "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant." Finally, the Commission was making a general investigation into the conduct and management of the business of the defendant carriers pursuant to section 12 of the act to regulate commerce (Petition, rec., pp. 14, 20, 29, 37), and the complaint

of Hearst was simply the *occasion* of the investigation. If the Commission would have had a right to this evidence if it had been making a general investigation exclusively, it would seem to be quibbling to say that it has no right to it because the general investigation included the investigation of a particular complaint.

II.

The test of relevancy to be applied in a proceeding before an administrative body like the Interstate Commerce Commission is not that strict test which is applied in trials at common law. In proceedings of the latter sort, the body which passes upon disputed questions of fact is, as a rule, untrained in legal reasoning and inexperienced in deciding issues of more or less complexity, and it is necessary, on that account, in order to prevent confusion and prejudice in the minds of the jurors, to exclude everything which is not of clear probative value. Of course, none of these considerations applies to the Interstate Commerce Commission, which is an administrative body of trained and experienced men, appointed to investigate and report to Congress upon the conditions of interstate transportation, and to hear complaints of abuses therein; and unless it is to be greatly hampered in its work and its usefulness to that extent impaired, it must be allowed very considerable latitude in determining what evidence is, and what is not, of sufficient probative force to be received,

provided, of course, that no constitutional right is infringed. This view was affirmed by one of the learned counsel for the respondents below, when he said, addressing the Commission:

> I appreciate that your honors are not bound by all of the strict rules of evidence, but I understand that the ordinary basic principles are followed. (Rec., p. 405.)

But it is not only supported by general reasoning; the very terms of the acts to regulate commerce clearly show that Congress did not intend that the Commission should be hindered and tied down in its investigations by the application of the strict common-law rules concerning relevancy. Thus section 12 of the act to regulate commerce provides that "the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers *full and complete information* necessary to enable the Commission to perform the duties and carry out the objects for which it was created; * * * and shall have power to require by subpœna the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents *relating to any matter under investigation*. And section 3 of the act of February 19, 1903—the Elkins act—goes still further, and

provides that "in proceedings under this act, and the acts to regulate commerce, the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects *relating directly or indirectly to the matter in controversy*, and to compel the production of all books and papers, both of the carrier and the shipper, which *relate directly or indirectly to such transaction.*"

Now, of course, *relating to* is a broader term than *relevant to*. Facts and circumstances may *relate to* a subject and yet not be *relevant* in the somewhat strict sense in which that term is used in works on the law of evidence.

This court, also, has recognized the broad range which the examinations of the Interstate Commerce Commission must necessarily take if it is to fulfill the purposes of its creation. In *Brimson's case* (154 U. S., 473), Mr. Justice Harlan, speaking for the court, said that it is not disputed that Congress has the power to authorize "the Commission to inquire into the management of the business of carriers subject to the provisions of the act, and *to investigate the whole subject of interstate commerce as conducted by such carriers*, and in that way to obtain *full and accurate information of all matters involved* in the enforcement of the act of Congress," and continued:

> It was clearly competent for Congress, to that end, to invest the Commission with

> authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents *relating to* any matter legally committed to that body for investigation.

And, again, in the same case, at page 474, the court said:

> An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers *relating to* that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the *full information necessary as a basis of intelligent legislation by Congress* from time to time upon the subject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.

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And in *Interstate Commerce Commission* v. *Cincinnati, New Orleans, etc., Railway Co.* (167 U. S., 479, 506) this court again spoke to the same effect:

> But has the Commission no functions to perform in respect to the matter of rates; no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which the same is conducted, and has the right to compel *complete and full information* as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the interstate-commerce act, shall be secured to all shippers. It must also see that that publicity which is required by section 6 is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions

> and enforcing obedience to all these provisions tends, as observed by Commissioner Cooley in *In re Chicago, St. Paul and Kansas City Railway* (2 Int. Com. Com. Rep., 231, 261), to both reasonableness and equality of rate as contemplated by the interstate-commerce act.

See also *Texas and Pac. Ry.* v. *Interstate Commerce Commission* (162 U. S., 212, 233).

Judged by the foregoing standards, it is submitted that the three groups of evidence described in the statement of the case, *supra*, are relevant and germane to the inquiries which the Interstate Commerce Commission was prosecuting and which it was authorized to prosecute; that is, they *relate to* the business and management of interstate carriers and the conditions of interstate transportation. I will now take up separately these three groups of evidence and point out briefly the specific grounds on which each is claimed to be relevant to, or to relate to, the subjects which the Commission was investigating.

III.

(1) The first group consists of the so-called purchase contracts between the railroads, or the coal companies controlled by them, and the individual operators described in the statement of the case, *supra*, pages 7–12. These contracts are relevant for a number of purposes.

(*a*) It is not disputed that the Commission is entitled to all facts relating to the transportation

of coal from the coal fields to the tide-water markets; and the production and sale of anthracite coal and its transportation have, through the action of the carriers themselves, become so closely interlaced and bound up together that it is impossible to make an intelligent study or investigation of the conditions of transportation between the coal regions and the seaboard without also inquiring into the relationship between the carriers, or their agencies and instrumentalities, and the production and sale of coal. Therefore, even if these contracts do relate to the sale of coal and not to its transportation, the carriers can not be heard to protest against their production on that ground, because they themselves have caused the two subjects to become so blended and interwoven that one can not be understood without investigating both. The principle on which this argument is based runs through the whole body of the law. It is the principle on which this court decided that a State could prohibit the manufacture of all oleomargarine, the good as well as the bad, because it baffled ordinary inspection to distinguish the good from the bad. (*Powell* v. *Pennsylvania*, 127 U. S., 678, 685.)

(*b*) But these contracts are not, in reality, contracts for the sale of coal, although on their face they purport to be, but contracts for the transportation of coal. What is actually done under them? How do they operate? How have they been regarded by shippers, and, indeed, by the

railroads themselves, as contracts of transportation or as contracts of sale? A consideration of these questions will disclose the true character of the contracts. The petition of the Commission (Rec., pp. 15–17) recites, for the convenience of the court, some of their essential provisions. It will be seen that what actually results from the operation of one of these contracts is this: The railroad company directly, or through its alter ego, the coal company, takes the coal of the independent operator off of his hands at the breakers, transports it to the tide water markets, and sells it, giving the operator 65 per cent of the average selling price for the month, and retaining 35 per cent. Now this 35 per cent, less the cost of selling, which is, as before stated, 10 to 20 cents a ton, clearly represents, in the final analysis, what the railroad company receives for the transportation service. The intervention of the artificial agency—a coal company owned or controlled by the railroad company—does not affect the essential character of the transaction, but only the details of bookkeeping; and in the case of the Delaware, Lackawanna and Western there is no such agency—no coal company. The contracts are, therefore, relevant on the general ground that they relate to transportation. But the record shows in several places (p. 392, for example) that the average selling price of coal per ton at tide water, during the life of these contracts, has been such that 35 per cent thereof, minus the cost of selling, was considerably less

than the published tariff of the railroads. For example, between April of 1902 and April of 1903 the market price of anthracite coal ranged from $4 to $4.50 a ton, f. o. b., New York Harbor (Rec., p. 392). Now, under the contracts in question, the railroads would get 35 per cent of this price, less the cost of selling, which would be, taking the figures most favorable to the railroads, that is, the highest market price and the lowest cost of selling, $1.47½—about 8 cents a ton less than the lowest and 28 cents a ton less than the highest published tariff rate from the coal fields to the seaboard. These contracts are relevant, therefore, to show a departure from the published transportation rates in favor of the shippers who entered into them with the railroad companies, and also as tending to show that the amounts the railroads actually received under them were reasonable charges for the transportation service rendered and that the published rates are too high.

That these so-called purchase contracts are regarded as transportation contracts by the railroads as well as by shippers is evidenced by the fact that for a long period prior to November, 1900, the transportation rates were adjusted on a basis equal to the difference between the price paid for coal at the breakers by the railroad company, or its coal company, and the price it received for the coal at tide water. Thus Henry E. Meeker, a witness on behalf of the complainant in the pro-

ceeding before the Interstate Commerce Commission, testified as follows (Rec., p. 513):

Mr. SHEARN. When coal is $4 at tide water you lose money on all you purchase, don't you?

Mr. MEEKER. Not on all; no.

Mr. SHEARN. On prepared sizes?

Mr. MEEKER. No.

Commissioner PROUTY. It depends on the road?

Mr. MEEKER. It depends on the road.

Mr. SHEARN. If it comes in on the Lehigh Valley?

Mr. MEEKER. I do if I have to pay $1.55.

Mr. SHEARN. Do you pay $1.55?

Mr. MEEKER. I do under protest.

Commissioner PROUTY. How long since you have?

Mr. MEEKER. I have protested since November, 1900.

Commissioner PROUTY. How long since you have paid $1.55?

Mr. MEEKER. Since November, 1900.

Commissioner PROUTY. What did you use to pay before that?

Mr. MEEKER. Prior to that $1.55 the rates were adjusted at the end of the month on a basis equal to the difference between the cost of the coal to the Lehigh Valley Coal Company at the breaker and the price that the Lehigh Valley Coal Company received for the coal at tide water.

Mr. SHEARN. That was adjusted in the shape of a rebate for you at the end of the month?

Mr. MEEKER. To all shippers.

Mr. SHEARN. That was prior to November, 1900?

Mr. MEEKER. Prior to the previous strike to this one.

Mr. SHEARN. How long had that arrangement been in force?

Mr. MEEKER. Several years.

The only difference in effect between the arrangement thus described and the so-called purchase contracts is that under the former the charge for the transportation was based on the difference between the price paid by the railroads for coal at the breakers and the price received by them at tide water, while under the latter scheme the transportation charge is based directly on the price realized at tide water.

(2) The Temple Iron Company contracts. According to the circuit court's own conclusion these contracts were part of the machinery by which the building of a new and competing railroad from the coal fields to the seaboard was prevented. It would certainly seem, therefore, that they are germane to an inquiry into the general conditions of railroad transportation between the coal fields and tide water; and such an inquiry the Commission was making, and indubitably had the right to make. They are germane, also, on more specific grounds; that is, (*a*) they tend to show that the railroads which are parties to them have formed a pool in violation of section 5 of the act to regulate commerce, and (*b*) they bear on the question to what

extent, if any, are the rates for the transportation of anthracite coal regulated by competition, and that consideration, in turn, has a direct bearing on the question, whether or not the rates are reasonable, as the counsel for the Delaware, Lackawanna and Western Railroad Company frankly admitted in the following colloquy with the chairman of the Commission (Rec., p. 365):

> The CHAIRMAN. I understood you to say substantially that the question as to whether a given rate is established and maintained by the carriers under conditions of competition or otherwise is competent to be shown as bearing on the reasonableness of that rate.
>
> Mr. Ross. Yes, sir.

(3) The questions propounded to Mr. E. B. Thomas and Mr. William H. Truesdale (statement of the case, *supra*). The circuit court declined to compel the witnesses to answer these questions, on the ground that "they relate wholly to the sale of coal, and not to its transportation." But in investigating the business of interstate transportation it is certainly competent for the Commission to inquire into the relation which the railroads sustain to the commodities which form the bulk of their tonnage; otherwise the investigation must be very imperfect, and its results unreliable and misleading. While, therefore, it is very true that the Interstate Commerce Commission can not inquire into the general subject of the production and sale of coal, it can and should, as a branch of

its power and duty to inquire into the manner and method of the management of the business of interstate railroads (sec. 12 of act to regulate commerce), investigate the relation that these railroads bear to the production and sale of coal, even though that relation be not in violation of the acts to regulate commerce. And the questions propounded to Mr. Thomas and Mr. Truesdale were intended to bring out this relation, and are clearly relevant for that purpose.

IV.

It is further contended that to compel the witnesses to produce the contracts in controversy and answer the questions propounded would be to (*a*) subject private papers to unreasonable searches and seizures in violation to the fourth amendment to the Federal Constitution; (*b*) make the witnesses furnish evidence that would subject them to a penal forfeiture, and (*c*) make them furnish evidence concerning a subject wholly within the jurisdiction of State power, and therefore beyond the cognizance of a body created by Congress.

It is not believed that the record discloses any real or substantial issue between Federal and State powers. Unless the evidence in controversy relates to the business or methods of *interstate* carriers and the conditions and circumstances of *interstate* transportation, it is conceded that it is not admissible. The objection that the production of the evidence would subject the witnesses who

are asked to produce it to a penal forfeiture is completely met by the act of February 11, 1893, extending to persons who testify in proceeding under the acts to regulate commerce absolute immunity from penalties or forfeitures on account of any evidence they may have given, and by the decision of this court in *Brown* v. *Walker* (161 U. S., 608) construing that act.

In answer to the contention that to compel the production of the contracts in issue would subject private papers to unreasonable searches and seizures, it is sufficient to say that it is elementary that a court, or an administrative body duly charged with the making of investigations, is entitled to consider as evidence the private papers of third parties as well as those of parties before it, and that in order to exclude such papers on the ground advanced, their relevancy having been established, it must be very clearly shown wherein their production would constitute an unreasonable search or seizure. And that has not been shown in this case. On the contrary, one of the third parties, for whose right to be secure from unreasonable search counsel for the railroads exhibited so much solicitude, flatly stated on the witness stand that he had one of the so-called purchase contracts, and personally did not object to producing it, and refused to do so simply because counsel for the railroads objected. (Rec., p. 456.) Neither is it thought that this court will be much impressed with the contention that to compel the production

of the Temple Iron Company contracts would constitute an unreasonable search or seizure of anyone's private papers, in the light of the fact that they are all printed in the record as exhibits to the answer of one of the appellees to the petition in this case, and in the additional light afforded by the following passage between the chairman of the Commission and counsel:

> The CHAIRMAN. Those papers must have all been made public at that time or the stock would not have been sold.
>
> Mr. CAMPBELL. *Yes; they were.* This is a question of principle we are discussing. There would not be the slightest objection to your honors seeing every word of them all at any time, but officially we do not desire you to regard them. (Rec., p. 351.)

This language makes it perfectly clear that the real ground of objection was that the contracts were irrelevant; not that their production would violate the privacy of anyone's papers or subject them to unreasonable search.

V.

The decree of the circuit court should be reversed, with directions to enter a decree granting the petition of the Interstate Commerce Commission.

W. A. DAY,
Assistant to the Attorney-General.

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